Malayan Banking Bhd v Ching Suit Fee

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02 FFL-2 OF 2011(W)
ZULKEFLI CJ (MALAYA), MOHD GHAZALI AND HASAN LAH FCJJ
11 JANUARY 2012

Banking — Banks and banking business — Letter of credit — Issuing bank paid monies on sight of irrevocable letter of credit without reservation — Discrepancies later found in documents concerning letter of credit — Whether monies paid under mistake — Whether issuing bank estopped from claiming for refund

A Taiwanese company ('the company') which purchased goods from the respondent instructed its issuing bank, TBB, to open a letter of credit for RM194,800 in the respondent's favour. The respondent requested the appellant bank to negotiate the transaction for the letter of credit and handed it various relevant documents for that purpose. The appellant later confirmed to the reimbursing bank, Hong Kong and Shanghai Banking Corp ('HSBC'), that the documents were complete and the terms and conditions of the letter of credit had been complied with and claimed payment of the RM194,800 from TBB through HSBC. TBB instructed HSBC to release the sum to the appellant which credited the respondent's account with RM194,605. Two days later, TBB informed the appellant there were discrepancies in the documents it had forwarded. The appellant thereupon demanded from the respondent a refund of the credited sum plus interest. The respondent objected, saying goods had been shipped and that all conditions of the letter of credit had been fulfilled. The respondent submitted rectified documents as requested by the appellant but made it clear that the appellant should not refund the monies received. The appellant, nevertheless, debited the respondent's account and refunded RM196,528 to HSBC. The respondent sued the appellant for wrongfully debiting her account. The High Court allowed her claim. The decision was upheld by the Court of Appeal on appeal. The appellant then appealed to the Federal Court.

Held, dismissing the appeal with RM25,000 costs:

(1) The issuing bank had no right to seek the return of the monies it had paid to the appellant as payment was mandatory upon sight of the irrevocable letter of credit (see paras 8–9).

(2) Having accepted the documents submitted and made payments without reservations, the issuing bank was estopped from demanding the return of the payment on the grounds of alleged defects or discrepancies. There

had to be certainty, promptness and finality of payment which a letter of credit served to provide to the transacting parties (see para 11).

(3) There was no evidence the respondent had requested for the return of the documents. At any rate, the alleged return of the documents for rectification did not give an automatic right to the appellant to demand a refund or debit the respondent's account unilaterally (see para 12).

(4) The appellant had requested for the documents for rectification by the respondent and to have them re-submitted. Hence the alleged discrepancies, if any, had been resolved and there was no basis for the return of the money (see para 12).

(5) There was no payment by mistake to the respondent because the payment was in fact due to her under the letter of credit. There was no equitable ground to hold the money that had been paid by mistake and there was no fraud on the respondent's part in receiving the payment. The appellant had, in fact, represented to the respondent that she was entitled to the payment and by doing so, the appellant was estopped from seeking a refund (see para 17).

[Bahasa Malaysia summary

Sebuah syarikat Taiwan ('syarikat') yang membeli barangan daripada responden mengarahkan bank pengeluarnya, TBB, untuk mengeluarkan surat kredit bagi sejumlah RM194,800 memihak kepada responden. Responden meminta bank perayu untuk merundingkan transaksi untuk surat kredit dan memberikan kepadanya pelbagai dokumen relevan bagi tujuan tersebut. Perayu kemudiannya mengesahkan kepada bank reimbursing, Hong Kong and Shanghai Banking Corp ('HSBC'), bahawa dokumen-dokumen adalah lengkap dan terma-terma dan syarat-syarat surat kredit telah dipenuhi dan pembayaran tuntutan sebanyak RM194,800 daripada TBB melalui HSBC. TBB mengarahkan HSBC untuk membayar jumlah tersebut kepada perayu yang mengkreditkan akaun responden dengan jumlah RM194,605. Dua hari kemudian, TBB memberitahu perayu terdapat percanggahan dalam dokumen-dokumen yang telah dihantar. Perayu dengan itu mendesak responden membayar semula jumlah yang dikreditkan dan faedah. Responden membantah, dengan menyatakan barangan telah dihantar dan bahawa kesemua syarat surat kredit telah dipenuhi. Responden menyerahkan dokumen-dokumen yang telah dipinda seperti yang dikehendaki oleh perayu tetapi menjelaskan bahawa perayu tidak patut membayar balik wang yang telah diterima. Perayu walau bagaimanapun mendebitkan akaun responden dan membayar balik RM196,528 kepada HSBC. Responden menyaman perayu kerana telah secara salah mendebitkan akaunnya. Mahkamah Tinggi membenarkan tuntutannya. Mahkamah Tinggi membenarkan tuntutannya.

Keputusan disahkan oleh Mahkamah Rayuan atas rayuan. Perayu kemudiannya merayu ke Mahkamah Persekutuan.

Diputuskan, menolak rayuan dengan kos RM25,000:

(1) Bank pengeluar tidak mempunyai hak untuk mendapatkan bayaran semula wang yang dibayarnya kepada perayu memandangkan bayaran adalah mandatori atas prospek surat kredit yang tidak boleh ditarik balik (lihat perenggan 8–9).

(2) Setelah menerima dokumen-dokumen yang diserahkan dan membuat bayaran tanpa kesangsian, bank pengeluar diestop daripada mendesak bayaran semula pembayaran atas alasan kecacatan atau percanggahan yang didakwa. Mesti terdapat ketentuan, kesegeraan dan penamatan bayaran yang mana surat kredit diserahkan untuk memperuntukkan kepada pihak-pihak yang membuat transaksi (lihat perenggan 11).

(3) Tidak terdapat keterangan bahawa responden telah memohon untuk pemulangan semula dokumen-dokumen tersebut. Walau bagaimanapun, pemulangan dokumen-dokumen yang didakwa untuk pembetulan tidak memberikan hak automatik kepada perayu untuk mendesak bayaran semula atau debit akaun responden secara sebelah pihak (lihat perenggan 12).

(4) Perayu telah memohon untuk pembetulan dokumen-dokumen oleh responden dan untuk ianya diserahkan semula. Maka percanggahan yang didakwa, jika ada, telah diselesaikan dan tidak terdapat asas untuk pemulangan wang tersebut (lihat perenggan 12).

(5) Tidak terdapat bayaran tersilap kepada responden kerana pembayaran sebenarnya perlu dibayar kepadanya di bawah surat kredit. Tidak terdapat alasan yang berekuiti untuk memutuskan wang tersebut dibayar atas kesilapan dan tiada fraud di pihak responden dalam menerima pembayaran tersebut. Perayu telah sebenarnya merepresentasikan kepada responden bahawa dia berhak kepada pembayaran dan dengan berbuat demikian perayu diestop daripada memohon bayaran semula (lihat perenggan 17).]

Notes

For cases on letter of credit, see 1(2) *Mallal's Digest* (4th Ed 2010 Reissue) paras 2292–2319.

Cases referred to

FC Seck Trading as Oversea Structural Company v Wong & Lee [1940] MLJ 182 (refd)

Hamzeh Malas & Sons v British Imex Industries Ltd [1958] 1 All ER 262 (refd)

Holt v Markham [1922] All ER 134, HL (refd)

Kelly v Solari [1835–1842] All ER Rep 320 (folld)
Shiba Prasad Singh v Chandra Nandi (1949) 76 IA 244, PC (refd)

Legislation referred to
Contracts Act 1950 s 73
Indian Contract Act 1950 [IND] s 72

Appeal from: Civil Appeal No W–02–719 of 2005 (Court of Appeal, Putrajaya)

GK Ganeson (KN Geetha and SP Tan with him) (Abd Aziz Chen & Co) for the appellant.
K Ganesan (Indira Ghadi & Co) for the respondent.

Zulkefli CJ (Malaya):

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the Court of Appeal in dismissing the appellant's appeal against the decision of the High Court in allowing the respondent's claim against the appellant. Leave to appeal was granted by this court on the following three questions:

(a) whether under the Uniform Customs and Practice for Documentary Credit International Chamber of Commerce (UCP 400) and international banking procedure, a negotiating bank had a right of recourse against a beneficiary of a letter of credit;

(b) whether the negotiating bank is obliged to return the monies paid by the issuing bank upon the return of the documents to the beneficiary; and

(c) whether under s 73 of the Contracts Act 1950, the negotiating bank was entitled to deduct its customers account for the purpose of returning monies equivalent to the issuing bank's demand?

BACKGROUND FACTS

[2] The relevant background facts and the chronology of events leading to the present appeal are as follows:

(a) on 6 July 1993, McMillan Enterprises Co Ltd, a Taiwanese company ('the company') instructed Taipei Business Bank ('TBB'), the issuing bank to open a letter of credit for a sum of RM194,800 in favour of the respondent in respect of purchase of goods by the company from the respondent. After receiving the letter of credit, the respondent requested the appellant, the negotiating bank to assist in the letter of credit's

transaction. The respondent handed various relevant documents to the appellant for it to 'negotiate' the letter of credit;

(b) on 6 July 1993, Standard Chartered Bank, the advising bank, advised the appellant that the letter of credit for the benefit of the respondent had been issued by TBB for the sum of RM194,800;

(c) on 10 July 1993, the respondent submitted the draft and documents for negotiations to the appellant which included:

(i) an original letter of credit No BAGAIM000937;

(ii) an original Airway Bill No 695 0094 5103;

(iii) original signed packing list in three copies;

(iv) two copies of signed bill of exchange; and

(v) two copies of signed documentary collecting/negotiation forms.

(d) on 12 July 1993 the appellant confirmed to the Hong Kong and Shanghai Banking Corp ('HSBC') the reimbursing bank that the said documents were complete and the terms and conditions of the said letter of credit had been complied with and hence the appellant claimed payment of RM194,800 from the issuing bank through the said reimbursement bank;

(e) on 20 July 1993 TBB gave confirmation to HSBC to pay the appellant the sum claimed by the appellant under the letter of credit;

(f) on 22 July 1993 the appellant credited the respondent's account with the sum of RM194,605;

(g) on 24 July 1993 TBB informed the appellant that there were discrepancies in the documents forwarded to them by the appellant;

(h) on 20 August 1993 the appellant demanded from the respondent for the refund of the sum credited together with interest;

(i) on 20 August 1993 the respondent refuted the appellant's demands, inter alia, stated that the goods had been shipped and that all conditions of the letter of credit had been fulfilled. Any refund made shall be at the appellant's own peril;

(j) on 21 August 1993 the respondent submitted documents duly rectified as per appellant's request and clearly stated that the appellant should withhold any refund;

(k) on 24 August 1993 despite the objection by the respondent, the appellant unilaterally proceeded to debit the respondent's account and refunded to HSBC the sum of RM196,528;

(l) on 28 August 1993 the appellant informed TBB that it was unable to

refund since TBB as the issuing bank had authorised payment and payment had in fact been received by the appellant;

(m) on 9 September 1993 the respondent sued the appellant claiming that the appellant had wrongly deducted the customer's account of the respondent for the purpose of returning monies equivalent to the issuing bank's demand; and

(n) the High Court allowed the respondent's claim against the appellant. The Court of Appeal on appeal affirmed the decision of the High Court. The appellant now appeals to this court against the decision of the Court of Appeal.

CONTENTION OF THE APPELLANT

[3] It is the contention of the appellant that in a letter of credit's transaction, documents travel in 'opposite direction' to the funds. It is based on documents which are negotiated instead of goods. Documentary requirements are of utmost priority. Discrepancies in documents would mark the end of the transaction, and time is of essence. When an issuing bank rejects the documents due to discrepancies, the beneficiary is entitled to demand for the return of the documents and the issuing bank must receive the credit it sent to the reimbursing bank.

[4] In the present case it is also contended on behalf of the appellant that there is a clear case of mistake when the respondent as the beneficiary was paid before the confirmation of the documents. The respondent was paid through the account held with the appellant. The appellant had a duty to return monies paid by mistake and the moment the respondent requested for return of its documents, the letter of credit's transaction no longer existed. The appellant further contended the fact that the respondent made a second attempt to commence a new letter of credit's transaction for the same item showed that there was a clear variation of the transaction. The respondent therefore does not have a valid claim after resorting to an alternative mechanism.

DECISION

The law relating to letter of credit

[5] At the outset it is necessary that we examine what is a letter of credit and its legal effect when it is issued. A letter of credit or documentary credit means any arrangement, however named or described whereby a bank (the issuing bank) acting at the request and on instructions of a customer (the applicant for the credit) is to make a payment to or to the order of a third party (the beneficiary), or is to pay or accept bills of exchange drawn by the beneficiary, or

authorises another bank to effect such payment, or to pay, accept or negotiate such bills of exchange against stipulated documents provided that the terms and conditions of the credit are complied with (see *Law of Banking* (2nd Ed), Poh Chu Chai).

[6] The law governing letter of credit in the present case is the uniform customs and practice for documentary credit international chamber of commerce ('UCP 400'). Articles 3 and 4 of the UCP 400 provides as follows:

> (3) Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contracts(s) is included in the credit.
>
> (4) In credit operations all parties concerned deal in documents, and not in goods, services and/or other performances to which the documents may relate.

[7] It is to be noted the type of letter of credit issued in this case is an irrevocable letter of credit. As regards this irrevocable letter of credit article 10(a)(iv) of the UCP 400 provided that:

> (a) An irrevocable credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented and that the terms and conditions of the credit are complied with: (iv) If the credit provides for negotiation — to pay without recourse to drawers and/or bona fide holders, draft(s) drawn by the beneficiary, at sight or at a tenor, on the applicant for the credit or on any other drawee stipulated in the credit other than the issuing bank itself, or to provide for negotiation by another bank and to pay, as above, if such negotiation is not effected.

[8] Based on the provision of article 10(a)(iv) of the UCP 400, we are of the view that upon the presentation of an irrevocable letter of credit to the issuing bank (TBB), it is a mandatory requirement that payment is to be effected upon sight of the said document by the issuing bank. The contract pursuant to the said letter of credit is considered by then to have been fully realised.

Right of recourse

[9] In relation to the appellant's rights of recourse it is our judgment that the issuing bank had no right to seek the return of the monies it had paid to the appellant as payment was upon sight of the documents. The issuing bank is estopped from seeking the return of the monies that it had lawfully remitted to the respondent through the appellant as the negotiating bank.

[10] The right of recourse does not arise in the present case because TBB as the issuing bank did honour the letter of credit at the first instance. Telegraphic

transfer and the remittance of the payment RM194,605 into the respondent's account was made on 22 July 1993 upon deduction of bank commission and charges. It was only on 24 July 1993 that the TBB, citing discrepancies in the letter of credit sought a refund from the appellant. The legitimacy of the TBB's request for a refund at that point of time was never questioned by the appellant at all. On 24 August 1993 the appellant provided TBB with a refund. It is to be noted however, that in a letter dated 28 August 1993 the appellant had informed TBB that it was unable to carry out TBB's instruction regarding the refund because the reimbursing bank had made the payment upon the authorisation of the issuing bank (TBB). The appellant therefore on its own had later admitted that the refund was not possible.

[11] We are of the view having accepted the documents submitted and made payments without reservations, the issuing bank is estopped from demanding the return of the payment made on the grounds of alleged defects or discrepancies. There must be certainty, promptness and finality of payment which a letter of credit serve to provide to the transacting parties. The court would also not lightly interfere with the bank's obligation to make payments under a letter of credit. On this point in *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 1 All ER 262, Jenkins LJ referred to the practice of the courts as follows:

> We were referred to several authorities, and it seems to be plain that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes on the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties on the question whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice.

[12] It is further noted in this case there is no evidence that the respondent had in fact requested for the return of the documents. The alleged return of the documents at any rate in our view does not give an automatic right for the appellant to demand a refund or debit the respondent's account unilaterally. The appellant had requested the documents for rectification by the respondent and to have them resubmitted. Hence the alleged discrepancies, if any, had been resolved and therefore there is no basis for the return of the money.

Indemnity

[13] A letter of indemnity was relied upon by the appellant to support the argument that the transaction was carried out under the UCP 400 which provides for a right of recourse. On this point we are in agreement with the finding of the Court of Appeal that the argument made by the appellant is

unnecessary for if there is an indemnity, the appellant's recourse to the respondent is upon the indemnity and not the UCP 400.

[14] Even assuming the appellant can rely on the letter of indemnity it is our judgment that the indemnity was suspect as to its authenticity and applicability to the said letter of credit's transaction. The respondent had lodged a police report in which she admitted that she had given the documents relating to the letter of credit as well as a letter of indemnity to the appellant. However, the respondent contended that she only signed a blank general indemnity and maintained that it was for other purposes. The learned trial judge of the High Court accepted the evidence of the respondent and held that the letter of indemnity was suspicious because the date had been blanked over and it was executed for other purposes. That is a finding of fact made by the trial judge and it is trite that this court as an appellate court should not disturb such a finding unless the trial judge had made an error of law or made a finding contrary to the evidence before him.

Section 73 of the Contracts Act 1950

[15] The appellant also relied on the provision of s 73 of the Contracts Act 1950 to support its contention that the appellant as the negotiating bank was entitled to deduct the customer's account of the respondent for the purpose of returning the monies equivalent to the issuing bank's demand. Section 73 of the Contracts Act 1950 reads:

> A person to whom the money has been paid, or anything delivered by mistake or under coercion, must repay or return it.

[16] Section 73 of the Contract Act 1950 applies both to mistake of fact as well as mistake of law. The Privy Council in the case of *Shiba Prasad Singh v Chandra Nandi* (1949) 76 IA 244 when construing payment by mistake under s 72 of the Indian Contracts Act which is in pari materia with our s 73 stated that it must refer to a payment which was not due and which could not have been enforced. The mistake is in thinking that the money paid was due when in fact it was not due. In the Singapore case of *FC Seck Trading as Oversea Structural Company v Wong & Lee* [1940] MLJ 182 it was held on appeal by the High Court that the court has the power to relieve against mistake of law as well as against mistake of fact if there is any equitable ground for doing so. Still, on the issue of payment by mistake in *Kelly v Solari* [1835–1842] All ER Rep 320 Lord Abinger CB, inter alia, held:

> The safest rule, however, is that if the party makes the payment with full knowledge of facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again.

[17] Based on the principles of law as laid down in the above cited case authorities it is our considered view for the present case there was no payment by mistake to the respondent because the payment made was in fact due to the respondent under the letter of credit. There is no equitable ground to hold that the money has been paid by mistake. There was also no fraud on the part of the respondent during her receipt of the payment. The appellant had in fact represented to the respondent that the respondent was entitled to the payment. By doing so the appellant is estopped from seeking a refund. On this point we would refer to the case of *Holt v Markham* [1922] All ER134 wherein Scrutton LJ at p 141 held:

> I think this is a simple case of estoppel. In this case the plaintiffs have, in my view, represented to the defendant that he is entitled to a sum of money as a gratuity and have paid it, and after a lapse of time sufficient to enable mistake to be detected and rectified, the defendant has acted on the representation and has spent the money before any claim on him for return has been made.

CONCLUSION

[18] For the reasons abovestated we would answer the three questions posed in this appeal in the negative. In the result the appeal is dismissed with costs. We award a sum of RM25,000 as costs to the respondent. Deposit to the respondent towards costs.

Appeal dismissed with RM25,000 costs.

Reported by Ashok Kumar